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# Supreme Court of the United States

OCTOBER TERM, 1968.

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No. [redacted]97

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MARGARET THOMAS POWE and WILLIAM A. POWE,
Petitioners,

versus

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

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**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.**

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M. M. ROBERTS,
P. O. Box 870,
Hattiesburg, Mississippi.

## INDEX.


| | Page |
|---|---|
| I. JURISDICTION | 1 |
| II. OPINIONS BELOW | 2 |
| III. STATEMENT OF GROUNDS FOR JURISDICTION | 2 |
| IV. QUESTIONS PRESENTED | 4 |
| V. STATUTES INVOLVED | 4 |
| VI. STATEMENT OF CASE | 4 |
| VII. REASONS FOR GRANTING THE WRIT | 6 |
| CONCLUSION | 9 |
| PROOF OF SERVICE | 10 |
| APPENDICES | |
| APPENDIX "A"—Opinion of Tax Court with Order | 11 |
| APPENDIX "B"—Opinion of Circuit Court of Appeals | 16 |
| APPENDIX "C"—Judgment of Circuit Court of Appeals | 19 |
| APPENDIX "D"—Order of Circuit Court of Appeals Denying Petition for Rehearing | 20 |

## CITATIONS.


| | Page |
|---|---|
| Carlton v. Commissioner of Internal Revenue, 190 F. 2d 183 | 7 |
| Commissioner of Internal Revenue v. Joseph Sunnen, 68 S.Ct. 715 (333 U.S. 591) 92 L.Ed. 898 | 6 |
| Cullers v. Commissioner of Internal Revenue, 237 F. 2d 611, 616 | 8 |
| Havemeyer v. United States, 59 F. Supp. 537, 66 S.Ct. 139 (326 U.S. 759) 90 L.Ed. 456 | 8 |
| Powe v. Commissioner of Internal Revenue, 389 F. 2d 46, 47 | 2 |


## STATUTES.


26 U.S.C. (IRC 1954) 2512 ..... 1, 2, 3, 4, 9

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Your petitioners Margaret Thomas Powe and William A. Powe of Hattiesburg, Forrest County, Mississippi, respectfully pray that a writ of certiorari be issued to review the decisions of the United States Court of Appeals for the Fifth Circuit entered on December 18, 1967, on petition for review of decision of the Tax Court of the United States (Mississippi case) and on petition for rehearing en banc entered on February 23, 1968, which affirmed the Tax Court of the United States, respecting federal gift tax liability for the year 1958.

## I.

## JURISDICTION.

Jurisdiction to review this case on petition for writ of certiorari is conferred upon this Court by 28

U.S.C., Section 1254 (1), and Supreme Court Rule 19(1)(b).

## II.

## OPINIONS BELOW.

The memorandum findings of fact and opinion of the Tax Court of the United States are not officially reported; but they appear in the record (R. 20-71). This petition concerns only those portions of said opinion relating to inclusion by the Court of mineral valuation factors when determining the value of lands found by the Tax Court, and limited part of the memorandum of findings of facts and opinion, with decision of the Tax Court is attached hereto as Appendix "A".

The opinion of the Court of Appeals for the Fifth Circuit affirming the Tax Court appears in the official reporter system (389 F. 2d 46, 47), and a copy of the opinion is attached hereto as Appendix "B"; and a copy of the judgment of the Court of Appeals for the Fifth Circuit is attached hereto as Appendix "C"; and a copy of the order of the Court of Appeals for the Fifth Circuit denying petition for rehearing en banc is attached hereto as Appendix "D".

## III.

## STATEMENT OF GROUNDS FOR JURISDICTION.

The grounds on which jurisdiction of this Court are invoked are:

(a) That the Circuit Court of Appeals for the Fifth Circuit has rendered a decision in conflict with the decision of another Court of Appeals on the same subject matter; and (b) said Court has decided an important question of federal law which has not been, but which should be, settled by this court; and (c) said Court has rendered its opinion in conflict with applicable decisions of this Court; and (d) said Circuit Court of Appeals has departed from the accepted and usual course of judicial proceedings and has followed the United States Tax Court in the cause to justify and require the exercise of the power of supervision of said courts; and pursuant to Supreme Court Rule 23(b), petitioners further say:

(i) The judgment of the United States Court of Appeals for the Fifth Circuit sought to be reviewed was dated and entered December 18, 1967.

(ii) Said Court entered order respecting a rehearing dated and filed February 23, 1968; and less than 90 days has passed since the entry of the order denying petition for rehearing en banc.

(iii) The statute primarily involved is 26 U.S.C. (1954 USC), Section 2512 which provides that if the gift is made in property, the value thereof at the date of the gift shall be considered the amount of the gift. Our witnesses denied considering mineral values; but the Tax Court fixed the value of associated minerals and the Court of Appeals on review of the Tax Court decision declined to reverse.

## IV.

## QUESTION PRESENTED.

The only question presented by this subject is that of whether the Tax Court improperly considered minerals as a valuation factor for lands, in the absence of any evidence respecting such factor for the gift date, said value not being a proper subject of judicial notice.

## V.

## STATUTES INVOLVED.

The statute affecting this determination is found in the provisions of 26 U.S.C. (1954 IRC) Section 2512. So far as here pertinent, that provision is:

"Sec. 2512—Valuation of Gifts.

(a) If the gift is made in property, the value thereof at the date of the gift shall be considered the amount of the gift."

## VI.

## STATEMENT OF CASE.

Petitioners created an irrevocable trust on April 22, 1958, for named beneficiaries, and transferred various properties as a gift to the trustee for the designated beneficiaries. The trust and the transfers were executed and delivered by the petition-

er husband, with the wife consenting. They both filed gift tax returns for the 1958 gifts, although there is stipulated between the parties that there is only one gift tax liability.

The properties transferred in gift to the trust included nine parcels of acreage, and the value of those tracts is source of the only issue presented. The Tax Court fixed the value as $42,609.00 less than the value determined by respondent in his statutory notice of deficiency, but $157,270.00 more than reported by petitioners in the returns.

The parties, on the trial before the Tax Court, advised the Court that there was no issue of mineral values respecting the subject lands, and all the witnesses testifying on valuation expressly denied considering mineral values when fixing their determination of values for the lands. (R. 294-95: All counsel for respondent, and colloquy with the Court at R. 296-98; R. 293-97: Revenue Agent Boone, the examining officer; R. 538-39, 598-99: Engineer Revenue Agent Huff; R. 221: Bryant, land purchaser and manager for petitioners; R. 382: Guthrie Consulting forester for petitioners; R. 302-357, 325, Vardaman, consulting forester for the petitioners; R. 451, Cranston, consulting forester for petitioners.)

The Court, in its opinion, fixed the value of the lands considering the value of associated minerals. (Appendix A: R. 63-67.)

The Court of Appeals, on review of the Tax Court decision, declined to reverse for that claimed error, stating that the decision had support in the record, and this in the absence of testimony relating thereto.

## VII.

## REASONS FOR GRANTING THE WRIT.

1. Petitioners, for the first time when the Tax Court opinion was released, learned that the Court had considered mineral values, while all the evidence denied that value of the minerals at the gift date had been considered.

The opinion of the Tax Court shows obviously that the opinion considered the fact of holding property a fact of determinable value at a date certain, namely, the gift date. While the record supports the fact of mineral rights held, there is no evidence as to their value. Contrarily, such evidence is specifically denied.

When petitioners were faced for the first time in the opinion with this issue, and were denied remand on review, they lost their last opportunity to meet an issue from outside the record.

2. The decisions below are in conflict with the requirements announced by this Court for such cases. *Commissioner of Internal Revenue v. Joseph Sunnen*, 68 S.Ct. 715, 724 (333 U.S. 591, 607) 92 L. Ed. 898, 911 (1948). Whereas, this Court declared that Tax Court

decisions, to be sustained, must be firmly grounded in the evidence and not inconsistent with the law. The Tax Court opinion on this issue had neither evidence nor legal consistency to support it.

The Court of Appeals, when affirming this issue, decided in conflict with its own announced rules for affirming. See *Carlton v. Commissioner of Internal Revenue*, 190 F. 2d 183, 185 (C.C.A. 5, 1951). Whereas, the Court had declared that valuation for gift tax purposes must be related to the facts, and unsupported opinion as to what the facts might have been at a critical date will not support post fact valuations. The opinion below had no critical date (the gift date) facts in the record. Furthermore, the reviewing Court later announced that Tax Court decisions reaching conclusions on facts or factors contrary to the weight of the evidence were reversible. Nevertheless, it affirmed this decision which forthrightly stated that it was relying on factors as to mineral values not of the gift date.

The affirming opinion below is in conflict with the decisions for the United States Court of Appeals for the Eighth Circuit, and from the United States Court of Claims. We refer to these cases.

In the Eighth Circuit case, it was held that the trier of facts may substitute bench judgment for the evidence, under proper circumstances, but that the record must disclose knowledge and experience of the trier relative to the subject matter. *Cullers v.*

*Commissioner of Internal Revenue*, 237 F. 2d 611, 616 (C.C.A. 8; 1956—Op. 7, 8). The Court has held that value must result from reasonable judgment having its basis in a proper consideration of all relevant factors. *Havemeyer v. United States*, 59, F. Supp. 537 (103 Ct. Cl. 564—1945) cert. den. 66 S. Ct. 139 (326 U.S. 759) 90 L.Ed. 456.

Absent a record showing of local knowledge in the trial court, and absent the relevant factor of value at the gift date. The decision below is in conflict with those of other competent jurisdictions.

3. Petitioners concede that the evidence shows consideration for the subject minerals when the same were acquired at times ranging from one year to thirteen years before the gift date. They concede also that minerals under one tract had been leased continuously from their acquisition dates. Petitioners note though that the record also shows minerals under the two most recent purchases (Williams and Fornea tracts) were condemned as worthless before the gift date by dry hole drilling. (The trial court valued the two latter tracts by consideration of timber environment only.)

The mineral values considered by the trial court for the six tracts here involved (from the total of nine tracts in the gift) are not shown in the opinion of the Tax Court. The aggregate reduction by the Tax Court as to value of certain tracts is $42,609.00 less than that in the statutory notice. But, if all such reduction be attributed to land value alone (disregarding the fact that some of it was on timber value) the

average value per acre would be in excess of $20.00. However, the Tax Court had found the average value per acre for land to be $15.00 to $20.00 under optimum conditions. (R. 43.) Where the final land value exceeds the value specifically found, some increase was obviously attributed to mineral value, but the record shows no mineral values at the gift date. This state of the case leaves the decision squarely in conflict with the precise date requirement of *Section 2512, supra.*

## CONCLUSION.

It is clear from that shown in the foregoing that the consideration of mineral values has no support in the record. Clearly, also, is the fact that the decision below is in direct conflict with the law and with the teaching from the judiciary as to how the law ought to be properly interpreted and applied.

If there were one relevant fact in the record as to mineral value for the subject lands at the gift date, petitioners are doubtful that this petition would be justified. Since the record is barren of such necessity, they are encouraged to seek review. They are without a forum, except this one, on an issue they could not anticipate, were firmly informed did not exist, and were judged on a surprise appearing in the decision for their first knowledge of it. Petitioners ought to have reasonable opportunity to test the legal sufficiency of consideration of minerals without evidence of their gift date value, but have been denied that they do not know the amount of such value as-

serted against them for the first time in the decision, and they say certiorari should be granted.

Wherefore, petitioners seek the review on basis of the record.

Respectfully submitted,

M. M. ROBERTS,
P. O. Box 870,
Hattiesburg, Mississippi.

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**PROOF OF SERVICE.**

I, M. M. Roberts, of attorneys for petitioners and a member of the Bar of the Supreme Court of the United States hereby certify that I have caused to be delivered three copies of the foregoing Petition for Writ of Certiorari to the Solicitor General of the United States, Washington, D. C. and have mailed, postage prepaid, to Honorable Mitchell Rogovin, Assistant Attorney General of the United States, and to Lee A. Jackson, Meyer Rothwacks, and Deene R. Goodlaw, Attorneys, Department of Justice, Washington, D. C. 20530, copies of the foregoing Petition for Writ of Certiorari on this .... day of May, A.D., 1968.

M. M. ROBERTS,
P. O. Box 870,
Hattiesburg, Mississippi,
Attorney for Petitioners.